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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 16

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Appellants,

v.

FRISCO TRANSPORTATION COMPANY, *Appellee.*

On Appeal From the United States District Court for the Eastern District of Missouri, Eastern Division

BRIEF FOR APPELLANTS RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

CARROLL J. DONOHUE
906 Olive Street
St. Louis 1, Missouri

CLARENCE M. MULHOLLAND
741 National Bank Bldg.,
Toledo 4, Ohio

JAMES L. HIGHSAW, JR.,
EDWARD J. HICKEY, JR.,
620 Tower Building,
Washington 5, D. C.

Attorneys for Appellants Railway Labor Executives' Association, et al.

Of Counsel:

MULHOLLAND, ROBIE & HICKEY,
620 Tower Building,
Washington 5, D. C.

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OPINIONS BELOW

The opinion of the District Court (R. 163-172) is reported at 153 F. Supp. 572. The opinion and order of the Interstate Commerce Commission (R. 593-617) are reported at 62 M.C.C. 367. The order of the Commission on reconsideration (R. 18-20) is unreported.

JURISDICTION

The judgment of the District Court was entered on August 9, 1957 (R. 175). Notice of appeal was filed by the Railway Labor Executives Association, et al, intervening defendants below, on October 8, 1957 (R. 188), and the appeal, designated as Case No. 637, was docketed in this Court on December 3, 1957. This Court on February 3, 1958, noted probable jurisdiction and consolidated the appeal with Cases Nos. 15 and 19. (R. 194). The jurisdiction of the Court to review the judgment of the District Court by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code. (28 U.S.C. 1253 and 2101(b)).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Does the Interstate Commerce Commission have authority, after notice and hearing, to impose conditions on motor carrier certificates of a wholly-owned subsidiary of a railroad for the purpose of insuring that the operations of the subsidiary are auxiliary to or supplemental of the parent railroad's train service under circumstances where:

(a) the operating rights represented by such certificates were acquired by the railroad subsidiary through purchase of independent motor carriers subject to the approval of the Interstate Commerce Commission under Section 213 (now Section 5 (2)) of the Interstate Commerce Act, which permits agency approval of such purchases only upon a finding that the parent railroad can use the motor carrier service to public advantage in its train operations;

(b) the Commission approved the purchases on the basis of findings that the railroad subsidiary proposed

to operate a coordinated rail-truck service and in accordance with said findings included in its reports and orders a condition that the approval was subject to such further limitations or restrictions as the agency might thereafter find necessary to impose in order to insure that the truck service be auxiliary to or supplemental of the parent railroad's train service;

(c) the reservation of authority contained in the Commission's reports and orders approving the purchases was not inserted in the certificates issued pursuant thereto.

2. If Question 1 is answered in the negative, the further question is presented as to whether the Commission had authority to take such action in the enumerated circumstances where the reservation of authority contained in the reports and orders approving the purchases was omitted from the certificates issued pursuant thereto through inadvertence.

3. If Question 2 is answered affirmatively, a further question is presented as to whether there was adequate evidence to support the Commission's finding that the reservation of authority was inadvertently omitted from the certificates.

STATUTES INVOLVED

This appeal primarily involves the National Transportation Policy, (49 U.S.C. preceding Section 1), Section 5 (2)(b), Section 212(a), and former Section 213(a)(1) of the Interstate Commerce Act. These statutory provisions are set forth in full in Appendix A hereto. Other applicable statutory provisions are cited or quoted at appropriate places in the brief.

STATEMENT

This appeal is from a judgment of a statutory three-judge court which held invalid an order of the Interstate Commerce Commission imposing conditions upon various motor carrier certificates of the Frisco Transportation Company (hereinafter called "the Transportation Company), designed to limit operations thereunder to services auxiliary to or supplemental of train services of the company's parent, the St. Louis-San Francisco Railway Company, (hereinafter called "the Frisco Railroad).[1]

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[1] The conditions imposed were as follows: (R. 614)

1. The service to be performed by the Frisco Transportation Company hereinafter called the Transportation Company, shall be limited to service which is auxiliary to, or supplemental of, the train service of the St. Louis-San Francisco Railway Company, except that this condition shall not apply with respect to Dyess, Arkansas.

2. The Transportation Company shall not render any service to or from any point not a station on a rail line of the railway, except that this condition shall not apply with respect to Dyess, Ark.

3. No shipments shall be transported by the Transportation Company between any of the following points, or through, or to, or from more than one of said points: Kansas City, Springfield, Joplin, St. Louis, Willow Springs, Cape Girardeau-Jackson-Chaffee (considered as one), Mo., Tulsa, Okla., Blytheville, Ark., Memphis, Tenn., and Amory-Tupelo (considered as one), Miss.

4. All contractual arrangements between the Transportation Company and the railway shall be reported to the Commission and shall be subject to revision if and as it finds necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as in the future the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, the train service of the railway.

The certificates involved authorized motor carrier services over four segments of Transportation Company's routes. The rights covering these segments were purchased by Transportation Company from prior independent operators and are identified in the Interstate Commerce Commission proceedings and the opinion below by the vendor's name. They are (1) the "Cooper" route between Joplin and Carthage, Missouri; (2) the "Hamm" route between Miami, Oklahoma and Joplin, Missouri; (3) the "Tolson" route between Walnut Ridge, Arkansas, and Memphis, Tennessee; and (4) the "Parker" route between Blytheville, Arkansas, and Memphis, Tennessee.[2] Section 213 of the Interstate Commerce Act (now Section 5(2))[3] required Transportation Company to obtain the approval of the Interstate Commerce Commission for its purchases of these routes. Paragraph (a)(1) of that section contained the following requirements as to the findings which the Commission must make as a condition precedent to its approval of transactions subject thereto:

> "* * * If the commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and condi-

[2] The Commission's action also covered a fifth segment known as the "Bennett" route between Blytheville and Lake City Arkansas, which is not involved in the appeal.

[3] Section 213 (49 U.S.C. 313) was repealed by the Transportation Act of 1940, Section 21(e) [54 Stat. 924], and the substance carried forward into Section 5(2).

tions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however, That if a carrier as defined in section 1(3) of Part I, or any person which is controlled by such a carrier or affiliated therewith within the meaning of section 5(8) of this title, is an applicant, the commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest enabling such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.*" (Italics supplied)

Transportation Company was and is the wholly-owned subsidiary of the Frisco Railroad, a carrier within the meaning of Section 1(3) of Part I of the Interstate Commerce Act [49 U.S.C. 1(3)]. (R. 164) Consequently, the Commission could legally approve Transportation Company's purchase of the segments involved only if the transactions met the test of the above quoted proviso in Section 213(a)(1). The Commission has long interpreted this proviso to limit acquisitions of motor carrier operations by railroads or railroad subsidiaries to those which are auxiliary to or supplemental of the railroad's train service. *United States v. Rock Island Motor Transit Co.*, 340 U.S. 419, 437 (1951); *Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt.*, 5 M.C.C. 9, 11, 12 (1937).

In acting upon Transportation Company's applications for approval of its proposed acquisitions, the Commission gave full effect to such restrictions on its authority.

In *Frisco Transportation Company—Purchase—Cooper*, 15 M.C.C. 317 (1938), the Commission (Div. 5) considered Transportation Company's application for approval to acquire the "Cooper" route. At page

318 of its report granting such approval, the Commission made the following finding:

> "The authority herein sought is desired to afford applicant and the railway means for developing coordinated rail truck service with a view toward retrieving some of the substantial volume of less-than-carload freight directed from the railway to competing highway carriers and to improve the railway's service to the public."

On the basis of this factual finding, the agency concluded that the purchase would enable the Frisco Railroad to use the motor service involved to public advantage in its own operations (page 319). At the same time the Commission recognized that experience might give rise to the necessity for the future imposition of specific conditions to achieve the required statutory limitations upon Transportation Company's purchased authority. The agency therefore imposed the following condition upon its approval (page 319):

> "Provided that the authority herein granted is subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to insure that the service shall be auxiliary to or supplemental to the train service of said railway company."

The application of Transportation Company to acquire the "Hamm" route came before the Commission in *Frisco Transportation Company—Purchase—Hamm*, 15 M.C.C. 320 (1938). The Commission (Div. 5) made the identical findings as to Transportation Company's intent to operate a coordinated rail-truck service as it made in connection with the "Cooper" purchase (page 321), and on such basis concluded that the purchase of the "Hamm" route would meet the re-

quirements of Section 213(a)(1). The Commission also conditioned its approval upon the same reservation of authority to impose future conditions upon the operation as the agency provided in the "Cooper" purchase (page 322).

Transportation Company's application for approval of its purchase of the "Parker" and the "Tolson" routes came before the Commission (Div. 5) in *Frisco Transportation Company—Purchase—Joseph W. Parker*, 25 M.C.C. 96 (1939). At page 99 of its report approving the purchase, the Commission made the following finding as to the type of service which Transportation Company proposed to operate if its purchase was approved:

> "Considerable evidence was offered showing the manner in which coordinated rail-truck service would be rendered similar in character to that described in *Frisco Transp. Co.—Purchase—Hamm, supra*, and many resulting benefits to the public are of record."

On this basis the Commission concluded (page 100) that the purchase would meet the requirements of Section 213(a)(1). It also imposed upon its approval of the purchase the identical reservation of authority to restrict the operations in the future as was placed upon its approval of the "Cooper" and "Hamm" purchases (page 100).

The application of Transportation Company to purchase the "Bennett" route came before the Commission (Div. 5) in *Frisco Transportation Company—Purchase—Bennett*, 35 M.C.C. 802 (1940). The agency without an opinion adopted the examiner's recommendation that it be approved and that authority be re-

served to impose future conditions to insure an auxiliary or supplemental operation.

The orders in these cases, as do all Commission orders, approved and authorized the purchases subject to the terms and conditions set out in the findings in the reports.

Transportation Company took no exceptions to the findings or conditional approvals in the above cited acquisition proceedings and consummated the transactions pursuant to such approval. (R. 2-8, 173).

Between March and July, 1939 "compliance orders" were issued by the Commission which set forth the authority to be embodied in the certificates to be issued to Tranportation Company pursuant to the agency's approval of the purchases of the "Cooper", "Hamm", "Tolson", and "Parker" routes. (R. 167). There was omitted from these orders the reservation of authority contained in the Commission's reports and orders approving the purchases to subject operations thereunder to such further limitations or restrictions as the Commission might find necessary to insure that the service be auxiliary to or supplemental of the Frisco Railroad's train service. (R. 167). The certificates subsequently issued pursuant to these "compliance orders" also omitted this reservation of authority. (R. 167). A certificate was issued to Transportation Company covering the "Bennett" route without a prior compliance order, which did contain the reservation of authority. (R. 165).

In July, 1941, prior to issuance of the certificates, a group of nine motor carriers operating in the same area as Transportation Company filed a complaint with the Commission alleging that such carrier's operations violated the Interstate Commerce Act and

agency orders. The burden of the complaint was that Transportation Company was performing a direct motor service in contravention of the conditions under which it was authorized to purchase its operating rights. (R. 167). The complaint came before Division 5 of the Commission in *Campbell Sixty-Six Express, Inc., et al.* v. *Frisco Transportation Company, et al.*, 43 M.C.C. 641. The Division made the following findings with respect to the operations of Transportation Company:

> 1. Transportation Company is engaged in performing an independent motor service of the same kind and character as is performed by motor carriers generally (page 647).
>
> 2. Transportation Company does not refute the claim that it is performing an independent motor service which is not auxiliary to or supplementary of the Frisco Railroad's train service (page 649).
>
> 3. Transportation Company's claim that its unrestricted service is beneficial is irrelevant since the issue before the Commission is whether the carrier has been authorized to perform only auxiliary and supplemental service to that of the Frisco Railroad. Transportation Company was not authorized to perform direct motor carrier service and should discontinue to do so (page 653).

Division 5 stated that the acquisition proceedings would be reopened to determine what conditions should be imposed to insure that Transportation Company's operations be auxiliary to or supplemental of the Frisco Railroad's service (page 653).

Transportation Company appealed the Division 5 decision to the full Commission in *Campbell Sixty-Six Express, Inc., et al.* v. *Frisco Transportation Company, et al.*, 46 M.C.C. 223 (1946), which held that the carrier

had not violated the terms of its certificates in its operations because the restrictions contained in the report and orders approving the purchases of the operations had been omitted from those certificates. The Commission stated, however, that its opinion did not mean that the certificates held by Transportation Company could not be corrected to reflect the intent of the findings in the acquisition proceedings or that restrictions could not now be imposed upon the Company's certificates which would have the effect of limiting service thereunder to that which is auxiliary to or supplemental of the Frisco Railroad's train service (page 225). Nor did the Commission disagree with Division 5's conclusion that in approving the acquisitions, the Commission had intended to limit the purchased operations to those which were auxiliary to or supplemental of the Frisco Railroad's train service.

Thereafter, on January 4, 1945, Division 5 reopened the acquisition proceedings for reconsideration and the issuance of an examiner's proposed report therein. (R. 196, 197). This proposed report was issued on February 8, 1945. (R. 197-214). The report (R. 201) cited the findings made by Division 5 in each of the acquisition proceedings and concluded:

> "These findings plainly disclose an intent to authorize the Transportation Company to perform a service by motor vehicle which would be auxiliary or supplementary to the rail service of the Railway. Furthermore, this intent is confirmed by the discussion preceding the respective findings wherein the proposed operations are described as a means for developing coordinated rail-truck service with a view to improving the Railway's service to the Public. No other type of service is mentioned in these discussions and hence, there is no basis for inferring that the findings authorize any

other type of service than that discussed. The fact that the Commission reserved the power to impose future limitations, restrictions, or modifications in order to insure the operation of auxiliary or supplemental service certainly presupposes the authorization of this type of service only. This conclusion remains true even though this authorized type of service was not specifically described as auxiliary or supplementary in the language of condition 1 in the findings in the finance proceedings. To remove any doubt as to the type of service which the Transportation Company is authorized to perform, the Commission should impose appropriate conditions pursuant to its reservation of power to impose future limitations, restrictions, or modifications."

The report then recommended specific conditions similar to those ultimately imposed in order to carry out the Commission's intent. (R. 214-217).

On March 29, 1945, Transportation Company filed exceptions to the report and requested a hearing to enable it to present certain new matters referred to in the exceptions, but not then of record. (R. 218, 226, 529). The Commission thereafter reopened the proceedings for further hearing. (R. 218-220). At the hearing, Transportation Company moved for discontinuance of the proceedings and presented evidence in support thereof. Also, at the request of the examiner, the Company presented evidence as to its operations and those of the Frisco Railroad. (R. 223-227).

On May 17, 1948, the hearing examiner served his report which proposed that conditions be imposed on the certificates of Transportation Company in question to insure that the service rendered thereunder shall in the future be limited to that which is auxiliary to or supplemental of the Frisco Railroad's rail serv-

ice. (R. 528-553). Transportation Company excepted to the examiner's recommendations, which were then reviewed by Division 5. In *Frisco Transportation Company Extension—Joplin-Miami,* 53 M.C.C. 415 (1951), the Division sustained the examiner and ordered that the Company's certificates be conditioned as recommended. (R. 559-589). The principal argument advanced by the Company for the rejection of the examiner's report was the claimed lack of power in the Commission to impose conditions on the carrier's certificates. However, the Division disagreed and made, *inter alia,* the following findings: (R. 570-576)

> (1) It is clear that Transportation Company's purchases of the routes in question were approved by the Commission solely to enable the carrier to perform an auxiliary and supplemental service and "the reports in each case clearly imply an intent and expectation that all motor operations not in aid of the rail service would not be undertaken."
>
> (2) The certificates in issue may not authorize operations greater than approved in the acquisition proceedings and to the extent that they do so were inadvertently issued and may be corrected to reflect the approved operation.

Transportation Company appealed the decision of Division 5 to the full Commission which sustained it. *Frisco Transportation Company—Extension— Joplin-Miami,* 62 M.C.C. 367 (1953).[4] The Commission held that the omission of the reservation from the "Cooper", "Hamm", "Tolson", and "Parker" certificates did not prevent it from reopening the acquisition cases to impose specific conditions on the operations covered by those certificates so as to insure that such operations are auxiliary to or supplemental of the Frisco Pail-

[4] R. 593-615.

road's train service. The agency set forth these conclusions as follows: (R. 603, 604)

> "We conclude that the certificates in each of the five proceedings, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the Division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority granted by the findings, such deficiency or deviation from the findings was inadvertent and consequently the certificates, departing as they do from the findings in the finance reports, were inadvertently issued. Under these circumstances the certificates may be revoked, and certificates in accordance with such findings issued without proceeding in accordance with the provisions of Section 212(a). No diminution of any authority actually authorized to be purchased, nor any partial revocation of any such authority, is involved."

The Commission therefore concluded that it might properly revoke or amend the certificates and issue new ones containing a reservation of authority and then proceed to consider what conditions should be imposed pursuant to such reservation. It decided, however, that such a course would be unnecessarily cumbersome since it had already had a hearing for the purpose of determining what conditions or limitations, if any, should be imposed. (R. 604). It thus proceeded directly to consider this question and to impose the conditions at issue on the certificates. (R. 604-610).

The Commission further held that the decision in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951) clearly established the power of the agency to similarly condition the "Bennett" certificate since authority to do so was reserved in the certificate. (R. 598, 599).

Thereafter, the Commission denied Transportation Company's petition for reconsideration (R. 18-20) and the carrier filed its complaint in the District Court (R. 1-15) to enjoin, set aside, suspend, and annul the agency's order.

The Railway Labor Executives Association et al.[5]

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[5] The Railway Labor Executives Association is composed of the following twenty-two standard international and national railway labor organizations, duly designated under the Railway Labor Act as the representatives of the bulk of the nation's rail employees including those of the Frisco Railroad:

American Railway Supervisors' Association
American Train Dispatchers' Association
Brotherhood of Locomotive Engineers
Brotherhood of Locomotive Firemen and Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen of America
Brotherhood of Railroad Trainmen
Brotherhood Railway Carmen of America
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees
Brotherhood of Sleeping Car Porters
Hotel & Restaurant Employees and Bartenders International Union
International Association of Machinists
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers
International Organization Masters, Mates & Pilots of America
National Marine Engineers' Beneficial Association
Order of Railway Conductors and Brakemen
Railroad Yardmasters of America
Sheet Metal Workers' International Association
Switchmen's Union of North America
The Order of Railroad Telegraphers.

The Association was joined in the motion to intervene by the Brotherhood of Railroad Trainmen and the Order of Railway Conductors and Brakemen, which were not then, but now are, members of the Association.

filed a motion to intevene in the proceedings as parties defendant representative of the Frisco Railroad's employees whose job security was protected by the Commission's order. This motion was granted by the three-judge statutory court convened to hear the complaint (R. 27) as provided in Sections 2321-2325 of the Judicial Code (28 U.S.C. 2321-2325)[6].

The District Court sustained the validity of the Commission's action in imposing conditions on the "Bennett" certificate on the authority of *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419. (R. 165).[7] However, the majority of the three-judge court held that the Commission's action in imposing conditions on the "Cooper", "Hamm", "Tolson", and "Parker" certificates constituted an invalid revocation or change in such certificates. The court based this holding upon the decision in *Watson Bros. Transportation Co.*, 132 F. Supp. 905, aff'd *per curiam*, 350 U.S. 927 (R. 168-170). The majority also held that in any event, it was not persuaded that the omission of the reservation of authority to impose further conditions from the certificates in question was the result of clerical error, and that the Commission's finding of inadvertence was not supported by the evidence. (R. 170-172).

District Judge Moore filed a dissenting opinion. (R. 173-175). This dissent rejected the view that *Watson*

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[6] This Court recently recognized the legal interest of rail employees in Commission orders dealing with the subject matter here involved and the status of the Association as a proper party to prosecute that interest in judicial proceedings involving such orders. *American Trucking Assoc. et al.*, v. *United States*, 355 U.S. —, 2 L. ed. 2d 158, 160 (1957).

[7] Transportation Company has not appealed this part of the District Court's judgment.

Bros. Transp. Co. v. *United States* was controlling. The dissent stated that there was nothing in that decision to indicate that this Court had changed the views expressed in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, sustaining the power of the Commission to revise motor carrier certificates issued to a railroad subsidiary in acquisition proceedings in order to insure that operations thereunder be supplemental to or auxiliary of the parent railroad's train service. Judge Moore further expressed the view that the omission from the certificates covering the four route segments of the reservation of authority contained in the reports in the acquisition proceedings was in fact a clerical error on the part of the Commission and not, as the majority found, the result of an intentional decision by the Commission to reverse the determinations made in those proceedings.

SUMMARY OF ARGUMENT

1. The court below erred in holding that the decision in *Watson Bros. Transportation Company* v. *United States*, 132 F. 2d 905, aff'd *per curiam*, 350 U.S. 927 (1956), established the invalidity of the Commission's action. This Court in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, reserved for future consideration the circumstances under which the Commission could impose conditions upon motor carrier certificates of a railroad-affiliate covering purchased operations to insure that such operations are auxiliary to or supplemental of the parent railroad's train service where no authority to do so is reserved in the certificate. *Watson* was not such a case. In the present case, the Commission reserved authority to impose the conditions in its reports and orders approving the purchases based on findings

that Transportation Company intended to operate a coordinated rail-truck service. It inadvertently omitted the reservation from the certificates issued pursuant to such reports and orders. The correction of the certificates by the Commission is consonant with established legal principles, past Commission practice, and the practice of other Federal agencies. Transportation Company could acquire no vested interest in the error because it was on legal notice that Section 213 (a)(1) of the statute permitted the Commission to authorize only an auxiliary and supplemental operation and had notice in fact of its limited authority through the reservation contained in the acquisition reports and orders which were final and binding upon it.

2. The decision of the majority below that the omission of the reservation was not inadvertent, but a deliberate reversal of Division 5, is contrary to the provisions of Section 17 of the Interstate Commerce Act, which make Division 5 reports and orders the final orders of the Commission unless reconsideration thereof is sought from the full Commission. Transportation Company did not seek reconsideration of the Division reports and orders approving the purchases including the reservation of authority to impose future auxiliary and supplemental conditions. Hence the issuance of the certificates to cover the purchased operations was purely a ministerial act to reflect the Division approval and the Commission correctly held that to the extent the certificates did not reflect the Division approval, there was an error in their preparation and issuance.

3. It is the position of appellants that there was no need for the Commission to amend the certificates of Transportation Company to insert the reservation of authority therein. The reservation in the opinions and

orders approving the purchases was legally sufficient to support a subsequent imposition of auxiliary and supplemental conditions. Such a reservation is simply a notice to the carrier that its operation is subject to certain statutory limitations and that it may be necessary in the future for the Commission to impose specific conditions to keep the operation within those limitations. Such a notice is just as adequate in orders approving a purchase as in a certificate issued pursuant to such an order, particularly since the certificate can legally give nothing more than is approved by the acquisition order.

4. The decision below is erroneous because it validates an operation which the Commission had no statutory power to authorize. Section 213(a)(1) and its successor Section 5(2)(b) plainly permit the purchase of motor carrier operations by railroad-affiliates only to the extent that the railroad itself can use the motor service to public advantage in its own train service. The Commission with judicial approval has translated this requirement into a rule that the motor carrier service must be auxiliary to or supplemental of the train service. Thus any approval of a railroad-affiliate purchase of motor carrier service carries with it this implied limitation. The Commission has no discretion at all to apply or not to apply the limitation. Any attempt to grant unlimited operating rights to a railroad-affiliate in a certificate covering purchased motor carrier operations is ultra vires and ineffective for that purpose. Thus, the Commission's action amounted to no more than making the certificates conform to the implied statutory limitation that had been present from the beginning.

ARGUMENT

The Commission's reports and orders which were the subject of the complaint below, decided (1) that the omission of the reservation of authority to impose future conditions contained in the reports and orders approving the "Cooper", "Hamm", "Tolson" and "Parker" purchases from the certificates subsequently issued to cover those operations was inadvertent; (2) that the Commission had authority to correct this inadvertence by issuing amended certificates containing the reservation; and (3) the conditions here involved should be inserted in the certificates pursuant to such reserved authority.

The decision in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951) established that the Commission clearly has authority to impose conditions such as are here involved on a railroad-affiliate motor carrier operation acquired by purchase where authority to impose auxiliary and supplemental conditions is reserved in the certificate issued to cover the operation. The case therefore boils down to the question of (a) whether the Commission had authority to amend the certificates to insert a reservation inadvertently omitted, and (b) whether the omission was in fact inadvertent. In addition, appellants urge that the Commission's action was correct in any event because the reservation of authority in the opinions and orders approving the purchases is a sufficient basis to later impose specific conditions regardless of whether it is inserted in the certificate. This is particularly true since the Commission had no power under the statute to give Transportation Company unrestricted rights over the routes involved and its action merely brought the operations into conformity with the statutory requirements.

I.

The Commission Had Authority to Amend the Certificates Involved to Include a Reservation of Authority to Impose Future Auxiliary and Supplemental Conditions Which It Inadvertently Omitted Therefrom

The majority below held that the amendment of Transportation Company's certificates covering the "Cooper", "Hamm", "Tolson", and "Parker" routes to insert therein a reservation of authority to impose future auxiliary and supplemental conditions and the imposition of specific conditions pursuant to such authority, was a revocation or modification of the certificates contrary to the requirements of Section 212(a) of the Interstate Commerce Act even though the reservation had been included in the reports and orders approving the purchases of the routes and had been inadvertently omitted from the certificates. This holding was based on the authority of *Watson Bros. Transportation Company* v. *United States,* 132 F. Supp. 905, aff'd *per curiam,* 350 U.S. 927 (R. 168-170).

District Judge Moore in his dissenting opinion rejected the majority view that the *Watson* case was dispositive of the Commission's action on the ground that this Court had left open such question in the *Rock Island* case. Judge Moore stated in dissent:[8]

> "I cannot accept the view of the majority that the Watson Bros. Transportation Co. case is controlling. The basis for my view is that the 'power to modify' issue which the Watson case is supposed to have settled was expressly reserved by the Supreme Court in the Rock Island case, *supra.*

[8] Judge Moore also made the point in his dissent that the language of Rule 16-1(e) of this Court's rules under which the *Watson* decision was affirmed was persuasive that the affirmance rested on the lack of notice and hearing involved, a problem not here present. (R. 174).

'This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and supplemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. If any such procedure should be undertaken by the Commission, that answer should await a fully developed statement and argument by the interests affected.' 340 U.S. 419, 445.' "

This view of the dissenting Judge is clearly correct. The *Watson* case involved a Commission attempt to revise a certificate issued to a motor carrier under Section 207 of the Interstate Commerce Act (49 U.S.C. 307) so as to take away a specific operating authority granted by the certificate. The decision holding that such an effort involved an attempted revocation or modification of a certificate contrary to the provisions of Section 212(a) clearly has no relevancy to the issue of the power of the Commission to impose auxiliary and supplemental conditions upon certificates covering motor carrier operations of a railroad subsidiary purchased subject to the requirements of Section 5(2)(b). This Court certainly could not have intended by affirming the *Watson* decision on motion to have decided the issue it reserved in the *Rock Island* case for a full statement and argument of all affected interests.

Upon consideration of the issue in the present case, appellants submit that there is no rule of law or equity which would prevent the Commission from correcting an inadvertent omission of a reservation of authority from a certificate issued to a railroad-affiliate pursuant to the approval of a purchase under Section 5(2)(b).

It is a generally recognized rule that relief will be granted against mistakes even in the case of judgments. 19 *Am. Jur.*, Equity, Section 51. This principle has been embodied in Rule 60 of the Federal Rules of Civil Procedure. (Fed. Rules Civ. Proc. rule 60, 28 U.S.C.A.). Paragraph (a) of the rule permits corrections in clerical mistakes in judgments and orders at any time upon motion or upon the initiative of the court. Paragraph (b) permits a party to be relieved from a final judgment or order because of mistake or inadvertence upon a motion made within one year.[9]

The Commission has consistently exercised authority pursuant to such principle to amend certificates which inadvertently did not reflect the terms of the orders directing or approving their issue. *Kenosha Auto Transport Corp.—Interpretation of Certificate,* 53 M.C.C. 85, 89 (1951); *Gray—Extension—General Commodities,* 52 M.C.C. 459, 460 (1951); *Petroleum Carrier Corp.* v. *Black,* 51 M.C.C. 717, 720 (1950); *A. C. E. Transp. Co. Inc.—Interpretation of Certificate,* 47 M.C.C. 202, 203 (1947).

The same authority has been exercised by the Civil Aeronautics Board under a statutory scheme[10] modelled upon the Interstate Commerce Act and under which the Board exercises power similar to that of the Commission. *Pan American Airways—North Atlantic Route Amendments,* 7 CAB 849 (1947). In the cited

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[9] The error here made was clearly a clerical one by the Commission's staff of the type covered by paragraph (a). In any event, the complaint against Transportation Company's operations was filed within a year of the issuance of the certificates.

[10] Civil Aeronautics Act, 49 U.S.C. 401 et seq.

case, the Board, after notice and hearing, amended a certificate issued to Pan American which had inadvertently, contrary to the findings in the Board's opinion granting the certificate, contained authority to serve Bermuda on a transatlantic air route.[11] The Board's reasoning as to its authority (7 CAB 852) is directly applicable to the present case:

> "There is nothing to preclude an administrative agency from correcting by a *nunc pro tunc* action inadvertent errors made in putting into appropriate documentary form the decisions taken by such agency. To rule otherwise would be in substance to legalize the retention of money or property paid under mistake. For a franchise for unlimited service from Washington and Boston to Bermuda is a matter of considerable monetary value to Pan American and may involve, through the necessity of mail pay, considerable financial loss to the Government—to say nothing of impairing the value of a franchise granted to another carrier, Colonial Airlines, for one of these routes, after considerable and painstaking scrutiny by the Board."

The only possible reason for not permitting the Commission to correct the inadvertent omission of the reservation of authority from Transportation Company's certificate would be a vested interest in the error acquired by the carrier through *bona fide* reliance thereon. There is and can be no such reliance here.

It is clear, appellants believe, that the Commission had no statutory authority under Section 213(a)(1) to issue to the Transportation Company certificates which would permit it to operate unrestricted motor

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[11] The Board's action was approved by the President under Section 801 of the Civil Aeronautics Act. (49 U.S.C. 601).

services without regard to the parent railroad's train service. (See discussion *infra*, pages 37-41). This limitation of the statute is set forth in plain unambiguous language so that the carrier could hardly plead ignorance. Appellants do not perceive how Transportation Company could acquire a vested interest in an authorization which was invalid *ab initio* if it meant what the carrier claimed it meant. In addition, the findings of the Commission (Div. 5) in the acquisition proceedings and the inclusion of the reservation of authority to impose future auxiliary and supplemental conditions in the reports and orders in those proceedings, put the carrier on clear notice of the limitations. These reports and orders became final and binding on the carrier when it did not appeal them to the full Commission. (Section 17(1), (4) of the Interstate Commerce Act, 49 U.S.C. 17(1), (4)).

If Transportation Company had any genuine doubt about the situation in the light of the reservation of authority in the acquisition reports and orders, it could easily have been cleared up through discussion with the Commission. The Civil Aeronautics Board rejected a claim of carrier reliance on an error in a certificate with the following words which are equally applicable to Transportation Company in the present situation:[12]

> "Again, Pan American is an active participant in many proceedings before the Board. Its counsel are in frequent contact with the Board and it is completely familiar with the tenor of proceedings before the Board. In the *Latin American Air Service* case, in which Pan American was a par-

[12] *Pan American Airways, North Atlantic Route Amendments*, 7 CAB 849, 852 (1947).

ticipant, the Board in authorizing one carrier, Colonial Airlines, Inc., to operate between Washington and Bermuda, gave extended consideration in its opinion (6 C.A.B. 857, 886-889), to the factors of public convenience and necessity which justified such conclusion. In the light of that action, taken less than a month prior to the Board's action in the *North Atlantic Route* amendment case, it would be unreasonable for the carrier to believe that the Board had authorized service between Boston and Bermuda, Philadelphia and Bermuda, Baltimore and Bermuda, Chicago and Bermuda, Detroit and Bermuda, and second-carrier service between Washington and Bermuda, without customary and detailed findings in its opinion supporting public convenience and necessity. *Had there been some reasonable basis for doubt with regard to this matter—and at the very least the evidence leads to the existence of a patent ambiguity—the exercise of ordinary and prudent judgment would have led this carrier in view of its constant and almost daily contact with the Board, to make some inquiry of the Board as to the extent of the rights it now seeks to assert and exercise under this certificate.* No such inquiry was made before schedules formally announcing the inauguration of service to Bermuda from Washington and Boston were filed." (Emphasis supplied)

Transportation Company was thus in no position to set up any claimed equities as a bar to the recognized principle that a tribunal may correct its mistakes. That principle should be given full effect in this case.

II.

The Omission of the Reservation of Authority from the Certificate Was in Fact an Inadvertent Error

The opinion below also raises the question of whether the omission of the reservation of authority was in fact inadvertent.

The hearing examiner who reconsidered the matter under the original order of Division 5 reopening the acquisition proceedings, reviewed the history of those proceedings and concluded that the Commission had never intended to grant Transportation Company unlimited rights. (R. 201, 202)

A different examiner conducted the hearings requested by Transportation Company, again reviewed in detail the acquisition proceedings (R. 531-539), and in his report concluded as follows: (R. 539, 540)

> "Turning now to the certificates: The entire Commission, reversing division 5, has found that so long as they remain unrestricted, that is so long as the reserved right to restrict remains unexercised, all-motor operations by the Transportation Company not connected with rail service are not unlawful even though contrary to the intent of the division in authorizing the acquisition. But it does not follow from this holding that the reserved right to restrict cannot or should not now be exercised. Neither is the exercise of such right precluded by the fact that it is not specifically referred to or restated in four of the five certificates here involved. These certificates, being based upon the findings in the finance proceedings, cannot authorize operations greater than those for the performance of which the division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority contemplated by the findings, such deficiency or

deviation from the findings constitutes an inadvertent ministerial error in the preparation of the certificates. An error of this type may properly be corrected by the Commission in the manner here contemplated without proceeding in accordance with the provisions of section 212(a). No diminution of any authority actually authorized to be purchased, nor any partial revocation of any kind, is involved."

Division 5, upon exceptions to the examiner's report for a third time conducted a review and analysis of the acquisition proceedings (R. 562-570) and in its report sustaining the examiner concluded: (R. 570, 571, 573)

"Admittedly, in each of the finance proceedings above discussed the Transportation Company disclosed a desire, if permitted to do so, to continue all-motor services independently of the Railroad, but in each proceeding it built its case primarily on the Railroad's need for an auxiliary motor service which would enable it to improve its less-than-carload rail freight service and upon the public benefits to be derived from a coordinated motor-rail service. And in each case the Commission, division 5, following then well established precedents disapproved the proposed independent all-motor operations and approved the proposed acquisition only to enable the Transportation Company to perform service auxiliary to or supplemental of the rail service of the Railroad, as is abundantly shown by the discussion in each report. In each instance, the finding that the purchase would be consistent with the public interest was clearly predicated upon the showing that the *Railroad* would be enabled thereby to use service by motor vehicle to public advantage in its *rail operations*. It is clear that the purchases were approved for no other purpose and the reports in

each case clearly imply an intent and expectation that all motor operations not in aid of the rail service would not be undertaken. Relying upon its declaration of its intent and expectation the division did not deem it necessary to impose specific conditions limiting the character of the future operations but to insure against the rendition by the Transportation Company of any other type of service than that intended the approval of the purchase was made subject, in each instance, to the unequivocal reservation of a right later to impose conditions should they be found necessary to prevent, in effect, a deviation by the Transportation Company from the auxiliary or supplementary service intended to be allowed despite what the Transportation Company might have hoped for respecting the performance of an all-out motor carrier service. Only by reading into these reports language that is not there can it be concluded that such an operation was even seriously considered, much less approved."

* * * *

The certificates here in issue, being based upon the findings in the finance proceedings, may not authorize operations greater than those for the performance of which the division authorized the purchase. To the extent that the certificates issued fail to reflect the character of authority contemplated by the findings, such deficiency or deviation from the findings was inadvertent and the findings in the finance reports, were inadvertently issued."

Finally, upon appeal of the Division 5 decision, the full Commission once again undertook a similar review (R. 596; 597, 600) and concluded (R. 603) that the reservation of authority to impose future auxiliary and supplemental conditions contained in the reports and orders of the Commission (Div. 5) approving the

purchases involved had been inadvertently omitted from the certificates issued to cover the acquisitions.

In spite of this clear history and findings, the majority below accepted Transportation Company's argument that the omissions had not in fact been inadvertent, but had been the result of an intentional and deliberate reversal of the Division 5 reports and orders by the Commission and that the subsequent effort to insert the reservation in the certificates merely reflected a Commission change of policy. (R. 170-172.) The pertinent conclusions of the majority below on the issue of inadvertence were: (R. 171, 172)

> "The report of the finance hearing examiner as to the four routes was adopted by a divided division of the Commission, with one dissent. Who would say that the Commission is bound by the recommendations of the hearing examiner? The books are full of cases where the recommendations of the hearing examiners have not been followed, and yet the certificates are not the result of clerical errors. The Commission is not a rubber stamp for the conclusions of hearing examiners.
>
> Months after the approval of the finance report by a divided division, compliance orders were issued for the four routes. Thereafter, a certificate was issued for the Bennett route containing restrictions. A complaint was filed by competing carriers, complaining that the plaintiff was ignoring the restrictions of the finance hearing report, but thereafter the four certificates were issued. In the face of all of this, the Commission would have us believe that the purported changes are made as the result of clerical error."
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> * * * *
>
> Clerical errors should be readily apparent. Such is not the case here. Four of the members of the

Commission dissented and one took no part. Two of the commissioners wrote dissents setting out that in their opinion the record does not justify the finding of the majority of the Commission.

The arguments advanced here for the defense are the arguments of the minority opinion in the *Watson Bros.* case, supra. What the Commission is trying to do is limit the four certificates in line with the present policy of the Commission and use a claimed clerical error that does not exist to justify such."

These conclusion are founded upon a totally erroneous conception of the relationships between examiners, Divisions, and the full Commission and are contrary to the statutory provisions regulating Division and Commission action.

An Interstate Commerce Division is a creature of the Interstate Commerce Act. Section 17(1) thereof (49 U.S.C. 17(1)) provides for the creation of such divisions as follows:

"(1) The Commission is hereby authorized by its order to divide the members thereof into as many divisions (each to consist of not less than three members) as it may deem necessary, which may be changed from time to time. Such divisions shall be designated, respectively, division one, division two, and so forth, or by a term descriptive of the principal subject, work, business, or function assigned or referred to such divisions. The Commission may designate one or more of its divisions as appellate divisions. Any Commissioner may be assigned to such division or divisions as the Commission may direct, and the senior in service of the Commissioners constituting a division shall act as chairman thereof unless otherwise directed by the Commission. When a vacancy occurs in any division or when a Commissioner because of absence,

or other cause, is unable to serve thereon, the Chairman of the Commission or any Commissioner designated by him for that purpose may serve temporarily on such division until the Commission otherwise orders."

Paragraph (2) of Section 17 authorizes the Commission to refer any of its work, business, or functions to Divisions. Paragraph (4) provides for reports and orders by Divisions and states that such reports and orders shall have the same force and effect as if issued by the Commission:

"(4) A division, an individual Commissioner, or a board shall have authority to hear and determine, order, certify, report, or otherwise act as to any work, business, or functions, assigned or referred thereto under the provisions of this section, and with respect thereto shall have all the jurisdiction and powers conferred by law upon the Commission, and be subject to the same duties and obligations. The secretary and seal of the Commission shall be the secretary and seal of each division, individual Commissioner, or board. Except as otherwise provided in this section, any order, decision, or requirement of a division, an individual Commissioner, or a board, with respect to any matter so assigned or referred, shall have the same force and effect, and may be made and evidenced in the same manner as if made or taken by the Commission."

Paragraphs (6) through (9) of Section 17 provide for the appeal of Division reports and orders to the full Commission for rehearing, reargument, or reconsideration. Paragraph (8) provides that upon such an appeal the Division order shall be stayed.

Transportation Company took no appeal to the full Commission from the reports and orders of Division 5

in the acquisition proceedings. (R. 2-8, 173) Thus, the *statute* made such reports and orders, including the reservation of authority to impose auxiliary and supplemental conditions, final and binding on the carrier. The Commission clearly never had before it the question of whether it should reverse Division 5 and grant Transportation Company unlimited rights. Nor could it legally have such issue before it in the absence of an appeal and could not have reversed Division 5 through the language used in the certificates even if it had so desired. The Commission pointed out this fact in its report which is here involved as follows: (R. 603)

> "May the findings of each of the finance proceedings specifically authorizing the approval of the purchase subject to the limitation be changed so as to eliminate any condition contained in the findings, except through a formal supplemental report, report on reconsideration, or a modifying order in the specific proceeding authorizing the said purchase? We think not. It would neither be fair nor equitable to the parties to the proceeding or to the general public to permit any such change other than in the manner specified. There has not been any type of report or order modifying the findings in any of the finance proceedings listed in part II of appendix A. The compliance order issued in each of the five proceedings sets forth the operating rights which the Transportation Company had been authorized to purchase, and in each instance omitted the limitation. In other words, each of the compliance orders and of necessity the certificates based thereon authorized operations greater than those for the performance of which the division authorized the purchase."

Thus, the issuance of the certificates was clearly a clerical and ministerial process to reflect the Division orders and could not legally be anything else. Division

5 in its report on reconsideration set forth this process as follows: (R. 572, 573)

> "We may, of course, take official notice of our administrative procedures and practices. The preparation of certificates is a duty assigned to our Section of Certificates. Upon adoption, reports and orders approving the issuance of certificates automatically and routinely go to this section. After the lapse of the prescribed time for filing petitions, the clerical employees of this section having no discretionary authority insert on a form containing mimeographed stock paragraphs the authority described in the findings of the report, namely, the commodities (if the transportation of property is involved), the origin and destination, routes, and restrictions or conditions, if any. They are concerned only with the findings and not with the text of the report, and their sole function is to transpose the substance of the findings onto the certificate form, making such changes in language as may be required to conform to the wording customarily used in certificates. They have no authority to add to, or detract from, the findings or to make any change therein even though the text of the report should show a discrepancy. In the latter event, corrective action may be taken only by the Commission or a division thereof through a formal supplemental report, report on reconsideration, or a modifying order. In performing this clerical duty, the employees in question exercise no judgment, discretion, or interpretative power as to the character of authority being certificated other than to call to our attention any patent discrepancies they discover. Their drafting of the certificate is not reviewed except by a supervisor also without discretionary authority solely to insure a correct reflection of the findings."

There is consequently no legal basis for Transportation Company's contention and the District Court's

conclusion that the certificates reflected an intentional reversal of Division 5 by the Commission. Under the circumstances, the omission could not be anything other than a clerical error.

The problem of the Commission in determining the existence of such error was not a matter of resolving factual issues, but of exercising a judgment based on its knowledge of the statute and its own procedures.

Transportation Company is equally charged with knowledge of the statutory procedures and there was no reasonable basis for it to assume that the Commission had deliberately reversed Division 5 by omitting the reservation from the certificates.

The assumption of the majority below that the conditions which the Commission imposed reflected a change in policy is equally erroneous. This argument was advanced in the *Rock Island* case and rejected (340 U.S. at page 442) on the ground that the conditions were an appropriate means of implementing the statutory requirements made pursuant to a reservation of authority.

III.

The Commission Action Was Validly Taken Pursuant to an Effective Reservation of Authority

The Commission grounded its action on the conclusion that it had inadvertently omitted from the certificates the reservation of authority to impose future auxiliary and supplemental conditions and that it had authority to correct the omission and then proceed to impose the conditions. However, appellants urge that the reservation of authority in the reports and orders of Division 5 approving the acquisitions was in and of

itself a sufficient legal basis for the subsequent Commission action without the necessity of placing the reservation in the certificates.

There is no reason in law or equity to hold such reservation ineffective simply because it does not appear in the certificate finally issued. Such a reservation is not in and of itself a restriction, but simply a notice to the applicant that his operation is subject to certain statutory limitations and that it may be necessary for the Commission in the future to impose conditions to keep the operation within those limitations. The question of whether the reservation should be in the certificate should not therefore turn on some abstract theory of the sanctity of a certificate, but on whether under the circumstances, the reservation gave adequate notice to the carrier of future possibilities.

Transportation Company's only argument that it was not adequate notice is that the subsequent omission of the reservation from the certificates reasonably led it to believe that the Commission had reversed Division 5 and approved the purchase of an unrestricted operation. Appellants have set forth above, pages 30-35, why this argument is without substance. The reservation in the opinions and orders approving the purchases clearly put Transportation Company on notice that its acquisitions were in fact limited by the proviso in Section 213(a)(1). These reservations were ample authority for the Commission's subsequent imposition of specific conditions to carry out the reservation.

IV.

The Decision Below Validates an Operation that the Commission Has No Statutory Authority to Approve

An affirmance of the decision below means the validation of an unrestricted independent motor carrier service by a railroad subsidiary without regard to its relationship to the parent railroad's train service in contravention of the clear requirements of Section 5(2)(b) and its predecessor Section 213(a)(1). The statute permits the Commission to approve the purchase of motor carrier services by railroads or their subsidiaries only to the extent that the *rail carrier* can utilize such motor carrier operations to public advantage in its train service. The Commission with judicial approval has translated this statutory requirement into a rule that the motor service must be auxiliary to or supplemental of the train service and has developed specific conditions to insure such an operation, *American Trucking Assoc. et al.* v. *United States*, 355 U.S. —, 2 L. ed. 158, 162:

> "By § 5(2)(b), which was formerly § 213(a)(1) of the Motor Carrier Act of 1935, the Congress authorized consolidation, merger, acquisition, or lease of carriers if found by the Commission to be 'consistent with the public interest.' However, in transactions involving a motor carrier where a railroad or its affiliate is an applicant, the Congress directed the Commission 'not [to] enter such an order unless it finds that the transaction proposed' not only is in the public interest but 'will enable such [railroad] carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.' The Commission has interpreted this mandate of the

> Congress to confine acquisition of a motor carrier by a railroad or its affiliate to 'operations . . . which are auxiliary or supplementary to train service.' We specifically approved this long administrative practice in United States v. Rock Island Motor Transit Co. (US) supra. It will be remembered that the acquisitions of the White Line and Frederickson routes by Motor Transit, wherein 'auxiliary or supplemental' restrictions were imposed, were pursuant to this section of the Act."

Thus, the Commission had no statutory power whatsoever to grant Transportation Company certificates to operate motor carrier services over the segments involved which were not auxiliary to or supplemental of the Railroad's train service.

There has been confusion throughout this proceeding on this point by reason of the fact that the Commission, with the understanding reluctance of all agencies to concede away jurisdiction, has not made this limitation on its authority clear. However, the Commission itself has recognized that it has no discretion in applying the standards of the proviso in Section 5(2)(b) to routes acquired by purchase. Thus, in *Cincinnati, N. & C. Ry. Co.—Control—Lehigh Valley Transit,* 57 M.C.C. 41 (1950), the Commission stated: (pages 49 and 52)

> "Applicants further contend that, assuming applicants are affiliated with the railway, it is not necessary that we find that the motor-vehicle service of the carriers of which control would be acquired would be used to public advantage by the railway in its operations because the literal requirements of the proviso of section 5(2)(b) can

be relaxed in order to carry out the declared national transportation policy.* * *

* * * * *

"Apparently applicants concede that they are unable to submit evidence sufficient to meet the proof requirements of the proviso of section 5(2)(b), the application contains no such evidence, and it is not apparent to us how those requirements can be met in view of the location of the railway, the nature of the service which it renders, and the location of the motor bus carriers which the partnership would indirectly control. We do not agree with the position of applicants that we are empowered to relax the specific requirements of the statute and find that this transaction would be consistent with the public interest, without also finding that the railroad would be enabled to use service by motor vehicle to public advantage in its operation. As stated in E.T.&W.N.C.M. Transportation Co.—Lease—Imperial Transp. Co., Inc., 5 M.C.C. 196: 'Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation.'"

This Court's statement in the *American Trucking Associations* case, quoted *supra,* page 37, clearly confirms such view of the limitations on railroad-affiliates in Section 5(2)(b) proceedings. That case goes on to recognize that in Section 206 and Section 207 certificate cases involving railroad-affiliates, the Commission has some small degree of discretion in applying the legal standards of Section 5(2)(b) in that it may "occasionally" depart from the auxiliary and supplementary limitations upon the basis of special public interest factors. (2 L. ed. 165). However, no such discretion

exists in proceedings under Section 5(2)(b), and any effort to exercise it would be invalid.[13]

Thus the Commission's action in issuing a certificate that authorized operations not permitted by the statute was ultra vires its statutory powers, and its subsequent imposition of conditions merely brought the certificate into conformity with the implied statutory limitation which had always been present. The Commission's action thus differs markedly from that involved in the *Watson* case where the agency had *statutory* power to grant the service it attempted to eliminate by amending the certificate.

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[13] In his separate opinion in *Schaffer Transportation Company* v. *United States*, 355 U.S. —, 2 L. ed. 117 (1957), at page 124, Mr. Justice Frankfurter set forth the existence of this difference between the Commission's authority under Section 5(2)(b) and Section 207 in the following language:

> "The Transportation Act of 1940 (amending the Interstate Commerce Act) grants to the Interstate Commerce Commission powers and imposes limitations upon their exercise in terms of greatly varying degrees of definiteness. As a consequence, the range of discretion left to the Commission and, correspondingly, the scope of judicial review of Commission orders greatly vary. Thus, our decision this day in Nos. 6 and 8, American Trucking Asso. v. United States [2 L. ed. 2d 158], is a striking illustration of the difference between the limitation to which the Commission is subjected in a proceeding under § 5(2)(b) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 USC § 5(2)(b), and the requirements of § 207 of that Act, as amended by 49 Stat. 551, 49 USC § 307, although both relate to motor carrier service by railroads."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the lower court involving the four certificates should be reversed and the Commission's orders affirmed.

Respectfully submitted,

CARROLL J. DONOHUE
906 Olive Street
St. Louis 1, Missouri

CLARENCE M. MULHOLLAND
741 National Bank Bldg.
Toledo 4, Ohio

JAMES L. HIGHSAW, JR.,
EDWARD J. HICKEY, JR.,
620 Tower Building,
Washington 5, D. C.

Attorneys for Appellants Railway Labor Executives' Association, et al.

Of Counsel:

MULHOLLAND, ROBIE & HICKEY,
620 Tower Building,
Washington 5, D. C.

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APPENDIX A

STATUTES INVOLVED

National Transportation Act of 1940 (49 U. S. C. 1 et seq.)

NATIONAL TRANSPORTATION POLICY (49 U. S. C., preceding sections 1, 301, 901 and 1001)

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

INTERSTATE COMMERCE ACT (49 U. S. C. 1 *et seq.*)

Section 5 (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more car-

riers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

Section 5 (2) (b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon

the terms and conditions, and with the modifications, so found to be just and reasonable: PROVIDED, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

SEC. 212 (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license; *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant

to the provisions of sections 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

Section 213 (a) (1) [49 U. S. C. Section 313 (a) (1)] Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the commission, and thereupon the commission shall, after such notice as is required by section 205(f) and if deemed by it necessary in order to determine whether the findings specified below may properly be made, set said application down for public hearing. If the commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing, such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however,* That if a carrier as defined in section 1 (3) of Part I, or any person which is controlled by such a carrier or affiliated therewith within the meaning of section 5(8) of this title, is an applicant, the commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest, enabling such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.